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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND W. LONDON, on behalf of Himself and All Others Similarly Situated, Plaintiff, v. NEW ALBERTSON'S, INC.; CERBERUS CAPITAL MANAGEMENT (CALIFORNIA), LLC, and SAVE MART SUPERMARKETS, Defendants.	Case No. 08 CV 1173 H CAB FIRST AMENDED CLASS ACTION COMPLAINT (1) VIOLATION OF THE CONFIDENTIALITY OF MEDICAL INFORMATION ACT [Cal. Civ. C. §§56, *et seq.*]; (2) BREACH OF UNILATERAL CONTRACT; (3) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; (4) SUPPRESSION OF FACT; (5) BREACH OF PRIVACY; (6) UNJUST ENRICHMENT; (7) TRESPASS TO PERSONALTY; (8) VIOLATION OF UNFAIR COMPETITION LAWS [Cal. Bus & Prof. Code § 17200, *et seq.*]; and (9) VIOLATION OF CONSUMERS LEGAL REMEDIES ACT [Cal. Civ. Code § 1750]. DEMAND FOR JURY TRIAL

I. INTRODUCTION

1. Plaintiff Raymond W. London ("Plaintiff" and/or "London") brings this Class action on behalf of himself as a consumer and prescription drug patient of New Albertson's, Inc. ("New Albertson's"), Cerberus Capital Management (California) LLC ("Cerberus"), and Save Mart Supermarkets ("Save Mart" and, collectively "Defendants"), on behalf of himself and all similarly situated California resident prescription drug patients of Defendants. Defendants operate in California through their retail pharmacy stores as described below. By his undersigned attorneys, Plaintiff alleges as to himself and his own actions, based upon his personal knowledge. All other allegations are based upon information and belief pursuant to the investigation of counsel or admissions by the named Defendants in public filings, documents or otherwise, for which Plaintiff believes substantial additional evidentiary support will exist following a reasonable opportunity for discovery.

2. At all times material Plaintiff was a prescription drug patient of Defendants (through their respective pharmacy operations) and lost money and property and suffered damage as a result of Defendants' improper, unlawful, unfair and deceptive use of proprietary patient information. Plaintiff London has been directly injured by Defendants' practices and activities within the period of the applicable statute of limitations as to each of the claims asserted herein. Plaintiff and the Class' injury and damage results from Defendants' wrongful activities which include, *inter alia*: (1) depriving Plaintiff and the Class of the exclusive use and control of their proprietary prescription information, a property interest both valuable and saleable which Defendants secretly, improperly, and without consent or authorization, sold and retained the value thereof; (2) using and selling Plaintiff and the Class' prescription information for commercial purposes without adequately anonymizing it, and without their express written authorization, in violation of the Confidentiality of Medical Information Act [Cal. Civ. Code §56, *et al.*] (the "CMIA"), and (3) disregard of Defendants' representations and/or terms and conditions for serving its pharmacy patients, as hereafter particularized.

3. Plaintiff London seeks to end Defendants' practices and the manner in which they are undertaken, so as to prevent future misconduct relating to the sale of patient health/medical

prescription information for the commercial purposes described herein. Plaintiff seeks equitable remedies, as well as statutory, compensatory and punitive damages as are available under California law and direct recompense for himself and all other Class members to such patient as his/her ownership interests in the health/medical prescription information allows.

II. NATURE OF THE ACTION

4. As mentioned above, Defendants cooperatively own, manage and operate retail pharmacy operations in California under such trade names as "Albertson's," "Sav-On," "Sav-On-Drug," "Osco Pharmacy," "Osco Drug," "Lucky's," "Save Mart," and "Jewel-Osco" (hereinafter referred to jointly as "Albertson's Pharmacy(ies)").

5. Plaintiff London and the Class seek damages and other remedies against Defendants for violation of the CMIA, as well as damages and/or equitable relief based on statutory and common law violations arising out of the systematic, unlawful and wrongful activities of Defendants in selling, for profit, Plaintiff and the Class members' proprietary prescription information to data mining companies (such as IMS Health, Inc. ("IMS"), or Verispan, Inc. ("Verispan")) that, in turn, share with or sell it to pharmaceutical companies for marketing (and other) purposes that have not been disclosed to, and/or authorized or consented by, the owners of said prescription information, *i.e.*, Plaintiff and the Class.

6. Defendants' use of their patients' confidential and proprietary prescription drug information (without the patient's authorization, knowledge or consent) is part and parcel of marketing campaigns routinely undertaken by pharmaceutical companies that use the resulting information to increase the writing of high-priced, name brand prescription drugs they manufacture for sale to the public. Defendants sell Plaintiff and the Class members' proprietary prescription information to allow the data mining firms and, in turn, their pharmaceutical company clients to identify prescription writing habits of doctor(s) (or other care givers) – a use contrary to the reasonable expectations of Plaintiff and other Class members when filling (or refilling) their prescriptions. Pharmaceutical companies, thereafter, pay the data mining firms for Plaintiff and the Class' prescription information, reconfigured to document prescriber conduct, in order to increase the sale of their drugs in accordance with their prescribing doctor's instructions. This enhances the

pharmaceutical industry's marketing effectiveness in using huge cadres of representatives, called "detail (wo)men" who confront doctors at their places of business armed with the resulting prescription writing profile and, invariably, use that information to encourage more prescriptions of their drugs or alter a doctor's prescription writing regimen.

7. The Defendants' conduct is unlawful in California though the process described is central to the marketing of high cost, non-generic prescription drugs in much of the country. It is only through Defendants' agreement (directly or indirectly) with these data mining companies that the patients' proprietary information is sold to facilitate the drug marketing programs of this country's large pharmaceutical companies. IMS and Verispan are both state of the art prescription information "data mining" companies. This systematic practice is a highly profitable scheme for the Defendants and has been continuously carried out by the Albertson's Pharmacies operating in California within the applicable statute of limitations.

8. Patients like Plaintiff London provide their proprietary and confidential prescription and drug information to a licensed pharmacist or pharmacy technician working at a retail Albertson's Pharmacy in order to have their prescription filled (or refilled).

9. This information is valuable property belonging to Plaintiff and the Class (evidenced by the payments Defendants routinely receive for this information from the data mining companies) that includes personally identifiable medical information and, *inter alia*, the patient's name, address, telephone number, prescription number, the unique national drug code ("NDC") for the medication he/she has been prescribed, the prescribing physician's DEA registration number, the patient's payment status (cash, insurance-paid, Medicaid/Medi-Cal funded), the dosage and quantity of the prescribed drug, and the date the prescription was filled.

10. The information of the prescription is a property interest owned by Plaintiff and the Class and not Defendants. Plaintiff and the Class do not expect their proprietary medical information to be used except for filling their prescription, or other purposes allowed by law. Lawful purposes are, essentially, limited to processing health insurance and similar payment requirements, public health emergencies, or other narrow uses. Defendants marketing purposes as described herein are do not constitute a lawful purpose under California or federal law. Plaintiff and the Class are

never asked, and never authorize or consent to, the use of their prescription drug information in the way that occurs through Defendants' sale of Plaintiff's information to data mining firms for the marketing purposes of large pharmaceutical companies.

11. Defendants promote their access to Plaintiff and the Class' proprietary prescription information, appreciating that pharmaceutical companies will pay to use the information to increase the sale of patented drugs. Defendants thus enter into contracts with data mining companies that pay them for the patient's proprietary prescription information contained in patient prescriptions. Such prescription information is entrusted to retail pharmacist for the sole purpose of following a doctor's drug regimen.

12. A lucrative market exits for the data identifying the prescribing practices of individual health care providers (called "prescriber's-identifiable data"). Defendants acquire prescription data in the ordinary course of their retail pharmacy business that data mining companies (such as IMS and Verispan) then purchase from them. Defendants and/or the data mining firms have certain, but not all aspects of Plaintiff and the Class' personal identifying medical information removed from the data sets sold to pharmaceutical companies. However this inadequately de-identified data still contains sufficient detail about the patient, their prescription, and the prescribing physician to permit the purchasing pharmaceutical company to identify Plaintiff and other members of the Class, either alone or by combining it with other data publicly or privately available. This allows the data miners' clients – large pharmaceutical companies – to easily identify doctors' prescription writing tendencies, so as to implement marketing plans targeted to specific prescribers and, in turn, their respective patients.

13. Currently, approximately 1.4 million licensed health care providers are authorized to write prescriptions in the United States for approximately 8,000 different pharmaceutical products in various forms, strengths, and doses. The prescriptions are filed by approximately 54,000 retail pharmacies and other licensed medical facilities throughout the United States. Retail pharmacies acquire prescription data during the regular course of business. For each prescription filled, a record is kept that includes the information detailed in ¶ 9, above. At each Albertson's Pharmacy, including those located in California, the patient's prescription data is centralized with data from other outlets

and stored in a central database maintained, operated and controlled by Defendants prior to the data's sale.

14. Data mining firms (like IMS and Verispan) are the world's leading providers of information, research, and analysis to the pharmaceutical and health care industries. IMS is the largest business in the field. It purchases prescription information from approximately 100 different suppliers. Verispan is smaller and obtains its information from approximately thirty to forty suppliers. These two data mining firms collectively acquire and analyze data from billions of prescription transactions per year throughout the United States.

15. Data mining firms like IMS and Verispan purchase prescription information including prescriber-identifiable data from Defendants via the Albertson's Pharmacies. Defendants allow data mining firms to install software on the Albertson's Pharmacies mainframe computer servers that captures and collates patient prescription information as it is transferred to the data mining firms' off site computer servers. After patient information is supposedly but inadequately "de-identified," a number is assigned to each patient that permits prescription information to be correlated for each patient but, *purportedly,* does not allow the patient's identity to be determined. The prescription information, including prescription information processed by Defendants' California Albertson's Pharmacies, is thereafter transferred to the data mining firms' computers where it is combined to allow physician identification and prescriber's habits when made available for sale to pharmaceutical companies.

16. One way the data mining companies add value to Albertson's Pharmacy prescriber-identifiable data is to combine it with prescriber reference information. This allows the data mining companies to, among other things, match each prescription to the correct prescriber, identify and use the prescriber's correct name, and add his/her address, speciality, and other professional information about the prescriber to the prescription data including, but not limited to, the doctor's script writing habits, *i.e.*, proclivity to prescribe and authorize refills of high-priced brand name drugs. Prescriber reference files are created using information obtained from various sources, including the (publicly available) American Medical Association's ("AMA") Physician Masterfile. The AMA's Masterfile contains demographic, educational, certification, licensure, and speciality information for more than

800,000 active U.S. medical doctors and over 90 percent of osteopathic doctors. The data mining companies use the patient prescription data in combination with the reference file data, to produce a variety of saleable patient databases.

17. The biggest end-clients by far for Albertson's Pharmacy patients' prescription information are large pharmaceutical companies. According to a 2005 report of a data mining company "[s]ales to the pharmaceutical industry accounted for substantially all of [IMS's] revenue in 2005, 2004 and 2003." In limited instances, however, the data miners also provide prescriber identifiable information to biotechnology firms, pharmaceutical distributors, government agencies, insurance companies, heath care groups, researchers, consulting organizations, the financial community, manufacturers of generic drugs, pharmacy benefit managers, and others, but this is only a small percentage of business compared to sales to pharmaceutical companies. The pharmaceutical companies commit vast resources to the marketing of prescription drugs. In 2000, the pharmaceutical industry spent approximately $15.7 billion on marketing, $4 billion of which was dedicated to direct-to-physician drug marketing strategies. More recent estimates suggest the industry currently spends between $25 billion and $30 billion per year on marketing. The large pharmaceutical companies spend roughly 30 percent of their revenues on promotion, marketing, and administration, while spending only approximately 13 percent on research and development. Pharmaceutical companies depend heavily on the direct to physician marketing resulting from Defendants' sale of prescriber identifiable information to market to doctors and other health care providers. The pharmaceutical companies' direct marketing practice that is most relevant to this lawsuit is their use of "detailing" to persuade individual health care providers to prescribe specific brand-name drugs.

18. Pharmaceutical "detailing" generally involves providing promotional information during face-to-face contact between pharmaceutical company sales representatives and health care providers. These sales representatives provide prescribers with both written and oral information about particular drugs in an effort to persuade them to prescribe the drug(s) being detailed. The company sales reps' also offer prescribers free samples that can then be distributed to patients at no charge and provide other inducements to prescribers and their staff. Many prescribers are reluctant

to meet with sales representatives. As a result, gifts, free meals, and similar inducements are frequently offered to the targeted health care providers and their staffs in an effort to facilitate access and encourage receptivity to the pharmaceutical company representative's sales pitch for a given brand-name drug.

A. Promotional Information

Pharmaceutical companies strictly control the information that their detailers are authorized to present on their behalf. Although sales representatives may provide prescribers with accurate information, misstatements and omissions occur. A 1995 study published in the Journal of the American Medical Association concluded that 11 percent of the in-person statements made to physicians by pharmaceutical sales representatives contradicted information that was readily available to them. Michael G. Ziegler, Pauline Lew, and Brian C. Singer, *The Accuracy of Drug Information From Pharmaceutical Sales Representatives*, 273 JAMA 1296-98 (1995).

B. Sampling

Product sampling is widely used in the direct to physician marketing of prescription drugs. Published reports estimate that the total annual retail value of sampled drugs exceeds $11 billion. Product sampling programs permit pharmaceutical company sales representatives to use sampled drugs as inducements to facilitate access to prescribers. They also promote sales by allowing prescribers to become familiar with the sampled drugs and by increasing the likelihood that patients will continue to request prescriptions for sampled drugs after their sample has been consumed.

C. Gifts, Meals and Other Inducements

Prescribers are often reluctant to meet with sales representatives. In an effort to overcome this reluctance, sales representatives provide health care providers and their staffs with gifts, free meals, and other similar inducements. In addition to facilitating access, such inducements help sales representatives build relationships with prescribers that can make them more receptive to the product information that sales representative provide.

D. Effectiveness of Detailing

Detailing is principally used only to market prescription drugs having patent protection. After the patents on a brand-name drug expire, competitors can obtain approval to sell generic bio equivalent versions of the drug. Generic drugs are generally substantially less expensive than their brand-name equivalents, and bio-equivalent generic drugs are equally effective for most patients. California law authorizes pharmacies to substitute a bioequivalent generic drug for a branded drug unless the prescriber specifies that the brand-name drug is not to be substituted. Accordingly, sales of brand-name drugs fall substantially after bio-equivalent generic drugs become available and detailing at that point is no longer seen as a cost-effective marketing technique. However, pharmaceutical companies continue to heavily market brand-name drugs as treatments for conditions that can also be treated with generic alternatives that are not bio-equivalent. For example, although depression can be treated for many patients with generic form of Prozac, several pharmaceutical companies also market different brand-name medications as a treatment for depression. Because brand-name medications are often substantially more expensive that bio-equivalent generic alternatives, those patients who achieve the same benefits from a non-bioequivalent generic medication can save money by substituting the non-bioequivalent generic medication for a branded alternative. In such situations, detailing can be an affective marketing technique for brand-name drugs. Detailing works by, among other things: (i) building name recognition among prescribers for the drug being detailed; (ii) providing information about the drug to prescribers in a form that is designed to be persuasive; (iii) providing inducements to providers consisting of free samples, gifts, and meals that facilitate access and foster relationships between the sales representatives and health care providers.

19. Pharmaceutical companies use prescriber-identifiable data of the type provided by Defendants for a number of purposes with the targeting of prescribers for detailing with a tailored message by far the most prominent. The process employed by pharmaceutical companies includes evaluating the effectiveness of detailing. Marketing is exponentially by far the most prevalent use of prescription data and the dynamic driving the Defendants' sale of prescription information to data mining firms.

A. Targeting

Pharmaceutical companies use prescriber-identifiable data to analyze the prescribing practices of specific health care providers. For example, pharmaceutical companies use prescriber-identifiable information when introducing new drugs to identify "early adopters" who have demonstrated by their past prescribing practices that they are disposed to prescribe new medications. They also use prescriber-identifiable data to identify health care providers who have recently changed their prescribing practices with respect to specific drugs, those who are prescribing large quantities of the drugs that the detailer is selling, and those who are prescribing competing drugs. Targeting health care providers in this manner enables pharmaceutical companies to efficiently allocate resources by providing samples to and detailing for those providers most likely to be responsive.

B. Tailoring

Pharmaceutical companies use prescriber-identifiable data to tailor their marketing messages to specific health care providers. For example, a sales representative might mention during a detailing session that the drug she is detailing does not have a specific side effect that is associated with a competing drug that the health care provider is currently prescribing and which the sales representatives would otherwise be unaware of.

C. Measuring the Effectiveness of Detailing

Prescriber-identifiable data is used to measure the effectiveness of detailing. Companies use the data to identify the ratio of brand-name to generic drugs prescribed by a given doctor, assess the success of or resistance of detailer visits, and measure the effectiveness of larger marketing campaigns and detail personnel. In this way, manufacturers adjust the marketing message that detailers bring to individual health care providers.

20. The overall effect of Defendants' practices relative to selling patient prescription information for use to create prescriber-identifiable data is, according to numerous health care advocates and legislature, an increase in prescription drug costs for patients, employers and California's Medi-Cal program. One state representative (not from California) recently testified at a hearing on this subject and compared the annual costs to Medicaid of a branded calcium channel blocker and a generic calcium channel blocker as a way to purportedly demonstrate a state's savings that occur if the sale of prescription information ceased. She claimed that a one-year supply of the branded drug (Dynacirc) would cost Medicaid $1,047, while a one-year supply of the purported equally effective generic drug (Verapamil) would cost only $162. The same representative also

submitted a short research paper written by Emily Clayton, a health care advocate for the California Public Interest Research Group (CALPIRG) (see Emily Clayton, *Tis Always The Season For Giving: A White Paper on the Practices and Problems of Pharmaceutical Detailing,* CALPIRG, Sept. 2004, available at http://calpirg.org/reports/TistheSeasonFor Giving04.pdf.). In the report, Clayton briefly explained that pharmaceutical companies purchase aggregated prescriber information from data mining companies and then use it "to specifically target their sales pitches when they meet with doctors." Based on Ms. Clayton's review of several other studies she concluded that detailing causes public mistrust of prescriber decisions, increased drug costs, and the provision of incomplete and/or misleading information to prescribers.

21. In chorus with the above, a representative of the Department of Health and Human Services ("DHHS") also recently discussed the large commercial market for prescriber-identifiable data, stating that commercial use of this information violates the prescribers' (*i.e.*, the doctors') "trade secrets." According to this representative, DHHS:

> believes that these activities ultimately drive up the cost of prescription drugs and the cost of health care in the aggregate. . . . [I]t would be hard for us to quantify what that impact might be, but I find it unlikely the drug companies are sending detail[ers] into doctors' offices for the purpose of selling doctors cheaper medication. In fact, I'm confident that, if you're a doctor, that one of the best ways to get a detailer into your office would be if you switched to prescribing a generic drug over a branded drug.

Hearing on H.B. 1346 Before S. Comm. on Exec. Departments & Administration, 159th Sess. Gen. Ct. 1, 8 (N.H. 2006) (statement of DHHS representative Gregory Moore).

22. According to further testimony on this subject, some detailers use prescriber-identifiable information to put improper pressure on prescribers. One anecdote shared by a nurse practitioner speaking in favor of restricting pharmaceutical company access to patient prescription data highlighted the alleged problem as follows:

> For the past several months, a drug rep has been bringing coffee to our office on Tuesday mornings. We have never asked her to continue doing this since we have a coffee pot, and we routinely make coffee for our staff and our patients. But she does it anyway, which is very nice of her. She calls this "Two for Tuesday." The problem is that every week she also says to me, "If you don't write 2 more prescriptions for my brand today, I'm not going to be able to continue bringing coffee." I prescribe her drug when it is right for my patients. There are many times when it is not right.
>
> We feel pressure from her to prescribe her product even though we have never asked to bring coffee. This may sound like a small thing, but I feel that since she knows

> exactly how many prescriptions I write each week for her drug versus the competition, she is expecting a quid pro quo.

Id. at 33.

23. A similar anecdote is described in a January 2006 article in the New York Times. According to the article, a district manager for a pharmaceutical company sent an e-mail to detailers in which she stated that:

> [O]ur goal is 50 or more scripts per week for each territory. If you are not achieving this goal, ask yourself if those doctors that you have such great relationships with are being fair to you. Hold them accountable for all the time, samples, lunches, dinners, programs, and past preceptorships that you have provided or paid for and get the business!! You can do it!!

Gardiner Harris & Robert Pear, *Drug Maker's Efforts to Compete in Lucrative Insulin Market Are Under Scrutiny*, N.Y. Times, Jan. 28, 2006.

24. In accordance with the preceding paragraphs, not only are the Defendants' practices improperly providing information owned by pharmacy patients for the Defendants' exclusive profit, violating the implied agreement they maintain with their pharmacy patients, doing so by using false or incomplete representations, while violating applicable statutes, but ending Defendants' practices as herein described would greatly benefit the immediate state problem of enormous, growing health care costs.

III. JURISDICTION AND VENUE

25. This action was commenced in California Superior Court and, thereafter, removed by New Albertson's and Cerberus. In their removal petition, said defendants asserted that the amount in controversy in this action is greater than $5,000,000 exclusive of interest and costs and members of the plaintiff class are citizens of states different from defendants herein. As a result, said defendants asserted that this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 and 1453.

26. Notwithstanding removal, venue is proper in this district pursuant to 28 U.S.C. § 1391(a), and (c) because: (a) one or more of the Defendants resided, transacted business, was found, or had agents in this district, and because a substantial part of the events giving rise to Plaintiff's

claims occurred in this district; and/or (b) Defendants maintain offices, have agents, transact business, or are found within this judicial district.

27. Defendants actively participate in substantial business activities in California and this county and intentionally avail themselves of the advantages of doing business in California and this county. Defendants extensively market and advertise in California while soliciting and conducting their Albertson's Pharmacy operations throughout the state.

IV. THE PARTIES

28. Plaintiff London is and at all relevant time has been a resident of California residing at Orange County, California. While a California consumer, Plaintiff London has been a recurring patient of Defendants (at Sav-On Drugs) and has been adversely affected and damaged in fact by the activities described herein including, not by way of limitation, the significantly impaired value of his proprietary prescription information, the failure to receive compensation for its use by Defendants, and the past and future lost earnings his information would have yielded had he chosen to sell same.

29. At all times material, defendant New Albertson's, Inc. was, and remains, a Delaware corporation headquartered in Boise, Idaho. New Albertson's owns and operates (with defendants Cerberus and Save Mart) the Albertson's Pharmacies, or combinations thereof. The Albertson's Pharmacies are one of the largest combined retail grocery store and pharmacy chains in California. Combined, Albertson's Pharmacy operations generate over $30 billion in revenue nationwide and purports to employ over 8,000 licensed pharmacists for this purpose.

30. At all times material, Defendant Cerberus Capital Management (California) LLC was, and remains, a limited liability company formed under Delaware law with its principal headquarters located at 1601 Cloverfield Blvd., 2nd Floor, South Tower, Santa Monica, California. At time material hereto Cerberus, either directly or by its parent company, owned, assumed by contract and/or was responsible for, certain of the pharmacy units conducting the activities alleged herein as improper, by Albertson's Pharmacies. According to defendant Albertsons Form S-4 Registration Statement filed with the Securities and Exchange Commission on March 14, 2006, defendant Cererbus purchased Albertsons' Pharmacy Stores in California pursuant to the January 22, 2006

Purchase and Separation Agreement by and among Albertson's, Inc., New Aloha Corporation, Supervalue, Inc., and AB Acquisition LLC (a Cerberus affiliated entity) (the "Purchase and Separation Agreement"). According to the Purchase and Separation Agreement, Cerberus and/or other Cerberus affiliated entities, which Plaintiff is informed and believes Cerberus provided consideration, funding, and/or loan agreements to, acquired some or all liabilities arising out of this litigation.

31. At times material, defendant Save Mart Supermarkets was, and remains, a California corporation headquartered in Modesto California operating approximately 204 retail grocery stores under the "Save Mart" trade banner. In or about 2007, Save Mart acquired all of the Albertson's-branded grocery stores located in California previously owned by Cerberus, which included stores having on-premises pharmacy units conducting business under the "Sav-On Drugs", "Albertsons," and/or "Osco Drugs" trade banner. Save Mart continues to operate the vast majority of the grocery stores and their respective on-premises pharmacy units acquired from Cerberus under the "Albertson's," "Sav-On Drugs," and "Osco Drugs" trade banner.

V. DEFENDANTS' REPRESENTATIONS CONCERNING THE USE OF PRESCRIPTION INFORMATION

32. At all relevant times Defendants made material representations through Albertson's brochures, pamphlets, media and advertisements (and on the Albertson's Pharmacy Internet web site) to Plaintiff and the Class without revealing that its patient proprietary prescription information would be used for the purposes described in this complaint. As a fragmentary example, Albertson's Pharmacies represented:

> Albertsons (also known as Sav-on Drugs, Sav-on Pharmacy, Osco Drug, Jewel-Osco, Acme & Shaws) is committed to a responsible and innovative pharmacy practice allowing us to meet the health care needs of our patients. Pharmacy is the cornerstone of our business and will continue to grow to meet the needs of our patients.
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> ***
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> Albertsons pharmacy systems incorporate strict controls to protect the privacy of our patients personal health information by only allowing access to this information by the trusted health professionals in the pharmacy.
>
> ***

> Except as required by law, Savon.com will not sell your name, address or similar personal information to third parties or permit the use of such information outside the scope of the Savon.com online shopping service or Savon.com general business purposes. Savon.com may, and reserves the right to, use and disclose internally within Savon.com any aggretated information, including information you provide to Savon.com, regarding Savon.com customers and usage of the online shopping service, for any purpose.
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> ***
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> Savon collects your personal information and prescription information (like your name. Doctor, allergies, address and insurance information) only for the fulfillment of your prescription order and to enable you to receive individualized customer service beyond what we can provide to anonymous users.
>
> ***
>
> Our Web site's registration form requires you to give us personal information (like your name and e-mail address), unique identifiers (like a unique user name), and demographic information (like your zip code and age). Savon will not sell your personal information to third parties. Your contact information is sued to contact you with questions regarding your order. Demographic an profile data is collected at our Web site. We use data to tailor your experience ay our Web site, showing you content that we think you might be interested in.
>
> ***
>
> Other Restrictions on Uses and Disclosures of Protected Health Information
>
> The uses and disclosures of your Protected Health Information described above are permitted or required by federal law. Some states have laws that require additional privacy safeguards above and beyond the federal requirements. Thus, if a state law is more restrictive regarding uses and disclosures of your Protected Health Information or provides you with greater rights with respect to your Protected Health Information, Albertsons will comply with the state law. If your state has enacted a more stringent law, we have attached as an addendum to this Notice our privacy practices regarding your Protected Health Information in that state.

(Emphasis added).

33. In fact and not withstanding the above, Defendants sold elements of Plaintiff and the Class' personal health information, and/or sold personal information to third parties and permitted its use outside any disclosed or permitted purpose, collected personal for sale and not solely for fulfillment of a prescription order, and used prescription data (like a patient's zip code) for sale, to third parties while representing the contrary.

34. In addition to Defendants' representations set forth in fragmentary form by the preceding paragraphs, substantial additional representations to the same effect were made by Albertsons Pharmacies in conveying their obligations to pharmacy patients during the class period.

All of such representations failed to disclose Defendants sale or similar use of patient prescription information and/or its use in the sale of prescribed identifiable data and, in fact, at no time have Defendants disclosed their practices in this area to patients.

VI. CONSPIRACY/AIDING & ABETTING ALLEGATIONS

35. New Albertson's, Cerberus and Save Mart have not engaged in the above described wrongful acts and practices alone. Instead, they acted together in combination and in furtherance of a common scheme and conspiracy to unlawfully use, share and sell their patients' confidential and proprietary property and medical information for the Defendants' financial benefit and at the detriment of Plaintiff and other Class members.

36. Each defendant and member of the conspiracy, with knowledge and intent, agreed to the overall objective of the conspiracy. They also agreed to, and actually committed, the above alleged acts of fraud and unlawful conduct with the goal of depriving Plaintiff and other Class members of their money and property in connection with the filling (and refilling) of prescriptions at Albertson's Pharmacies by, thereafter, using, sharing and selling the patient's confidential and proprietary medical information. Indeed, for the fraudulent and unlawful scheme described above to be successful, each defendant member of the conspiracy had to agree to enact and utilize the same devices and fraudulent tactics against the Plaintiff and other members of the Class.

37. Numerous common facts and similar activities evidences the existence of a conspiracy among all Defendants including, *inter alia*: (a) pharmacy patients prescribed brand-named drugs are intentionally targeted for inclusion into Defendants' marketing and sales data base; (b) advertisements and marketing representations made in Defendants' their pharmacy materials uniformly fail to disclose and/or suppress the actual intended usages of a patient's confidential medical information in connection with the patient's filling or refilling of a drug prescription; (c) Defendants' licensed pharmacists and pharmacy technicians at the Albertson's Pharmacies owned, operated or controlled by the Defendants also uniformly fail to disclose and/or suppress the fact of Defendants' for-profit scheme to use, share and sell a patient's confidential medical information; and (d) Defendants, in fact, unlawfully harvest and use, share and sell their patients' confidential and

proprietary medical information for the Defendants' financial benefit and at the detriment of Plaintiff and other Class members.

38. Thus, each defendant was a direct participant and/or co-conspirator and/or joint tortfeasor and/or aider and abetter in the wrongs alleged herein through their common ownership/investment/management/ and monitoring of Albertson's Pharmacy operations, including the unlawful harvesting and resultant use, sharing and sale of confidential patient information.

VII. CLASS ACTION ALLEGATIONS

39. Plaintiff London brings this representative action on behalf of himself and on behalf of all other similarly situated California-resident pharmacy patients of Defendants that had a prescription(s) filled at or by an Albertson's Pharmacy that sold, in whole or part, the prescription information provided to Albertson's Pharmacy personnel. The proposed Class which Plaintiff London seeks to represent is accordingly defined as:

> All California residents who, as of the date of the commencement of this action and within the applicable limitations period(s) (the "Class Period"), filled a prescription at or by an Albertson's, Sav-On Drug, Osco Drug, Jewel Osco or Save Mart pharmacy and had their proprietary prescription information commercially sold, shared, or otherwise used by a database mining company that paid Defendants for such information.

40. Excluded from the Class are the Defendants, their predecessors, parents, subsidiaries, and affiliated entities; any entity in which any of them has a controlling interest; any employees, officers or directors of any of them; and any of their legal representatives, heirs, successors and assignees.

41. This action may properly be maintained as a Class action pursuant to Federal Rule of Civil Procedure 23.

42. The members of the Class are so numerous that joinder of their individual claims is impracticable. Plaintiff London is informed and believes, and on that basis alleges, that there are thousands of members of the proposed Class. The precise number of Class members and their addresses are presently unknown to Plaintiff London, but can be easily obtained from Defendants' files and records. Further, Class members can be notified of the pendency of this action by published and/or mailed notice and the process is not difficult or complicated.

43. Common questions of law and fact exist as to all members of the Class. These questions predominate over questions affecting only individual Class members. These common legal and factual questions include, but are not limited to:

(a) Whether Defendants are liable for their activities in accordance with the provisions of the CMIA and the amount of statutory damage thus owing;

(b) Whether Defendants are liable for violating Plaintiff's and the Class' constitutional privacy rights including informational privacy and the amount of damages;

(c) Whether Defendants breached unilateral contract(s) with their pharmacy patients;

(d) Whether Defendants are liable for false misleading and/or deceptive representation based on their statements, course of dealings and/or omissions of material fact relative to Plaintiff and the Class;

(e) Whether Defendants' use and sale of a patient's confidential and proprietary prescription information is a violation of California law as a fraud or deceit on the Class susceptible to Class treatment and, if so, the liability of Defendants;

(f) Whether Defendants were obligated to but failed to act as fiduciaries or quasi-fiduciaries to members of the Class;

(g) Whether Defendants are liable for suppressing disclosure of material facts to Plaintiff London and the Class after otherwise addressing the question of Defendants' use and sale of confidential patient prescription information;

(h) Whether Defendants have acted in breach of the implied covenant of good faith and fair dealing;

(i) The nature and extent of damages, equitable and other remedies to which Plaintiff London and the other members of the Class are entitled; and

(j) Have the Defendants been unjustly enriched and, if so, the damages owed as a result.

44. Plaintiff London's claims are typical of the claims of the other members of the Class. London and each of the members of the putative Class provided Defendants with a prescription

containing a patient's confidential and proprietary medical information that, without authorization or consent, was then shared, sold, or otherwise used in a manner providing significant profit/monies to Defendants but not Plaintiffs.

45. Plaintiff London is an adequate representative of the Class because (a) his interests do not conflict with the interests of the individual members of the Class he seeks to represent; (b) he has retained counsel who are competent and experienced in complex Class action litigation; and (c) he intends to prosecute this action vigorously. The interests of the members of the Class will be fairly and adequately protected by London and his counsel.

46. Plaintiff London and the members of the Class have all sustained actual damage in that at the least, each has lost money and property as a result of Defendants' conduct. The value of the property owned by each class member has been diminished (if not eliminated) and money received therefore by Defendants not been provided Plaintiff and the Class. Further, Plaintiffs' ability to sell his property interest has been frustrated though otherwise infeasible if not for Defendant's activities. Absent a Class action, Defendants will retain millions of dollars for selling information properly belonging to Plaintiff London and respective members of the putative Class. Absent a Class action, each Class member will not receive suitable equitable relief and damages under, *inter alia,* the CMIA, and other statutes and will continue to be victims of Defendants' violation of law and the inflated drug costs. No justification exists for Defendants being allowed to retain the proceeds resulting from its sale of prescription information belonging to patients to third party data mining companies.

47. The Class action device is superior to other available means for the fair and efficient adjudication of the claims of Plaintiff London and the Class. The damages suffered by each of the Class members may be too small to warrant the filing of individual suits. Moreover, the issues raised by Defendants' conduct may be too complex to be efficiently and cost effectively resolved in individual litigation. Hence, this Class action is the best method for all the Class members' common claims to be adjudicated in a single proceeding.

FIRST CAUSE OF ACTION

Violation Of The Confidentiality of Medical Information Act
Cal. Civil Code §§56, *et seq.*
(Against All Defendants)

48. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

49. New Albertson's and Save Mart by and through the Albertson's Pharmacies are licenced pharmacies pursuant to Chapter 9 of Division 2 of Cal. Bus. & Prof. Code and are thus "provider(s) of health care" pursuant to Cal. Civil Code §56.05(j) of the Confidentiality of Medical Information Act ("CMIA"). Defendant Cerberus is a principal, co-owner, aider and abettor, and/or successor-in-interest to New Albertson's and, in turn, New Albertson's predecessor's operation of Albertson's Pharmacies in systematic violation of the CMIA as detailed above. Defendant Cerberus' liability under the CMIA for its past misconduct is not mitigated by its recent sale and divestiture of its Albertson's Pharmacy ownership interests and operations to Defendant Save Mart.

50. Defendants, in the regular course of operating the Albertson's Pharmacies, collect and maintain individually identifiable medical information as defined by Cal. Civil Code § 56.05(g). Pharmacists and pharmacies are licensed pursuant to Chapter 9 of Division 2 of the Business and Professions Code and thus fall within the statutory definition relating to the regulation of "health care" set forth at Cal. Civil Code §56.05(d) under the CMIA. *See* Cal. Bus. & Prof. Code, §§ 4001, *et seq.*

51. The CMIA prohibits activities specified to violate the requirements in maintaining medical confidentiality and separately, regulates practices by those subject to the CMIA that might result in violations of medical confidentiality (i.e. its provisions may be preventive). For example, while Cal Civil Code § 56.10(c)(5) [one of seventeen (17) permissive disclosures under the CMIA] allows Defendants to disclose "medical information" (defined at § 56.05(f)) in the possession of a licensed pharmacist to "any private or public body responsible for licensing or accrediting" the health care provider, the patient's "identifying medical information" is not allowed to be removed from the "premises" of the health care provider, *i.e.*, the central pharmacy operations computer database linked to Albertson's Pharmacies that is owned and operated by Defendants. The statutory scheme

accordingly addresses both access to confidential medical information and, once obtained, the subsequent uses, maintenance and sale of such information.

52. As alleged above, Defendants' shared use with, and/or sale of Plaintiff and the Class' prescription information to, data mining companies such as IMS and Verispan without first sufficiently anonymizing patient confidential information and data sets (thus protecting against the reconstitution of confidential patient-information through its combination with other information or data sets that are publicly or privately available), constituted prohibited activities and/or practices under the CMIA that include the following:

Prohibition on Unauthorized Disclosure of Medical Information

> (a) No provider of health care, health care service plan, or contractor shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization. . . .
>
> ***
>
> (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.[1]
>
> (e) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no contractor or corporation and its subsidiaries and affiliates shall further disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan or insurer or self-insured employer received under this section to any person or entity that is not engaged in providing direct health care services to the patient or his or her provider of health care or health care service plan or insurer or self-insured employer.

See Cal. Civil Code § 56.10 (emphasis added).

53. Defendants do not seek, nor do they receive authorization (as that term is defined in Cal. Civil Code § 56.11) from Plaintiff and the Class before intentionally selling, sharing, using or disclosing the proprietary prescription information of Plaintiff and the Class to data mining firms

[1] Effective January 1, 2004, this paragraph was amended to include the words "use for marketing" to clarify prohibited uses of confidential medical information (*i.e.* (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan, contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, **use for marketing**, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.

such as IMS and Verispan. Defendants are not excused from seeking authorization from Plaintiff and the Class because none of the exceptions to the authorization requirement in Cal. Civil Code § 56.10 subd. (b) or (c) apply to Defendants' behavior.

54. Defendants' use, shared use, and/or sale of Plaintiff and the Class' proprietary and confidential prescription information is ***not*** necessary to provide treatment or health care services to Plaintiff and the Class, as the purpose of such use, sharing and/or sale is for Defendants' ***commercial profit***, in connection with the marketing campaigns orchestrated by and between Defendants and the participating pharmaceutical companies.

55. Defendants do not disclose Plaintiff and the Class' proprietary and confidential medical information to data mining firms such as IMS and Verispan for the purpose of encoding, encrypting, or otherwise anonymizing such information, as such information is disclosed to IMS and Verispan under contract(s) of sale for the purpose of developing marketing programs for pharmaceutical companies.

56. Plaintiff London, individually and on behalf of the Class, requests that the Court find Defendants liable for violations of the CMIA as set forth hereinabove, or otherwise finding Defendants' procedure for purportedly de-identifying "prescription information" does not insulate Defendants from liability pursuant to the CMIA and/or separately, that insufficiently or marginally de-identified medical information as marketed by Defendants violates the CMIA as a prohibited "use" pursuant to CMIA (§56.10(d)). In accordance with Cal. Civil Code §§ 56.35 and 56.36(b)(1), Plaintiff and the Class request that Defendants pay statutory damages of $1,000 for each and every instance in which Defendants have used, shared and/or sold a patient's medical information that was obtained by them from the patient's prescription.

SECOND CAUSE OF ACTION

Breach of Unilateral Contract(s)
(Against All Defendants)

57. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

58. At all relevant times a unilateral contract existed between Defendants and the Class members based on Defendants' express and implied representations that:

> Except as required by law, Savon.com will not sell your name, address or similar personal information to third parties or permit the use of such information outside the scope of the Savon.com online shopping service or Savon.com general business purposes. Savon.com may, and reserves the right to, use and disclose internally within Savon.com any aggretated information, including information you provide to Savon.com, regarding Savon.com customers and usage of the online shopping service, for any purpose.
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> ***
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> Savon collects your personal information and prescription information (like your name. Doctor, allergies, address and insurance information) only for the fulfillment of your prescription order and to enable you to receive individualized customer service beyond what we can provide to anonymous users.
>
> ***
>
> Our Web site's registration form requires you to give us personal information (like your name and e-mail address), unique identifiers (like a unique user name), and demographic information (like your zip code and age). Savon will not sell your personal information to third parties. Your contact information is sued to contact you with questions regarding your order. Demographic an profile data is collected at our Web site. We use data to tailor your experience ay our Web site, showing you content that we think you might be interested in.
>
> ***
>
> Other Restrictions on Uses and Disclosures of Protected Health Information
>
> The uses and disclosures of your Protected Health Information described above are permitted or required by federal law. Some states have laws that require additional privacy safeguards above and beyond the federal requirements. Thus, if a state law is more restrictive regarding uses and disclosures of your Protected Health Information or provides you with greater rights with respect to your Protected Health Information, Albertsons will comply with the state law. If your state has enacted a more stringent law, we have attached as an addendum to this Notice our privacy practices regarding your Protected Health Information in that state.

(Emphasis added).

59. Plaintiff and the Class, in consideration for the above promises in Defendants' Notice of Privacy Practices, and other express and implied promises made by Defendants, including but not limited to, promises that: Albertson's Pharmacies would not use Plaintiff and the Class members' confidential medical information for the marketing of drugs in exchange for payment; Plaintiff and Class member(s) individually identifiable medical information would not be shared, sold, used for marketing, or otherwise used or disclosed for purposes not necessary to providing health care

services to Plaintiff and the Class; Plaintiff and the Class member(s) confidential medical information would be safeguarded as prescribed by regulation and statute, acted to reposit with Albertson's Pharmacies their individually identifiable medical information in the reasonable expectation and belief that such information would be safeguarded according to law, and otherwise acted to forgo other alternatives for the filling of their prescriptions, including filling such prescriptions and repositing their individually identifiable medical information with other law abiding pharmacies.

60. Defendants breached the above promises to Plaintiff and the Class by: (a) allowing access to protected health information to persons and entities other than the "trusted health professionals" in Albertson's Pharmacies; (b) failing to comply with the relevant provisions of California law, including the CMIA, pharmacy regulations, and privacy laws pertaining to the safeguarding of confidential medical information; and (c) by selling Plaintiff and the Class' prescription information without written authorization from Plaintiff and the Class as represented by Defendants and required by the CMIA.

61. At all relevant times Plaintiff and Class members acted reasonably in their beliefs and expectations that formed the parameters of the contract with Defendants and that was violated by the activities of Defendants as specified above because California law dictates, *inter alia*, that parties, like Albertson's Pharmacies, which are licensed to sell or work with products that are highly regulated by government agencies are deemed liable for noncompliance with the regulations applicable to the licensing process (for example, Vermont and 1101th Medical Arts Pharmacy v. Board of Pharmacy (1981) 125 Cal.App.3d 19), and Defendants' activities, complained of herein, failed to comply with the regulations (and the law) applicable to the California licensing process for pharmacies.

62. At all relevant times Plaintiff and the Class acted reasonably and uniformly in their beliefs and expectations forming the basis of their actions and forebearances in consideration for Defendants' promises as detailed above. In actuality, however, Defendants' activities and practices involving the sale and use of the Plaintiff and other members of the Class' confidential medical information breached their unilateral contract(s) with Plaintiff and the Class, and also constituted a

violation of controlling regulations and laws prohibiting the conduct of Defendants in their pharmacy operations as complained of herein.

63. Additionally, Cal. Code of Pharmacy Reg. § 1764 (Title 16, Division 17) applies to Albertson's Pharmacies and directs that no California pharmacist is permitted to reveal the contents of any prescription or the nature of the illness of any patient or reveal any information furnished by the doctor with any person other than the patient (or his/her authorized representative). Yet Defendants routinely transfer and disclose the contents of Plaintiff and the Class members' prescription medical information to data mining companies like IMS and Verispan, their agents, representatives, contractors and sub-contractors, and other persons in violation of the referenced regulations and in breach of its promises to abide by California law.

64. Defendants breached their unilateral contract(s) with Plaintiff and the Class by failing and refusing to abide by the relevant provisions of the CMIA, California pharmacy regulations, and privacy law as complained of herein. Separately, Defendants breached those agreement(s) by committing the acts and practices alleged herein when Defendants misappropriated and misused the confidential medical information of Plaintiff and other Class members without their authorization for pecuniary gain. Plaintiff and each Class member, however, have performed all conditions required under the terms of the parties' unilateral contract, excepting those that have been waived or excused by operation of Defendants' breaches or misconduct.

65. Defendants' systematic breaches unilateral and uniform contract(s) with Plaintiff and other Class members has deprived them of the reasonable value and profits derived from Defendants' misappropriation and misuse of their individually identifiable medical information and prescription information for which the Plaintiff and the Class are entitled to recover as damages, in an amount to be established at trial according to proof.

THIRD CAUSE OF ACTION

Violation Of The Implied Covenant Of Good Faith And Fair Dealing (Against All Defendants)

66. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

67. It is well settled that in every contract there is an implied covenant that imposes upon each party as duty of good faith and fair dealing in its performance and its enforcement.

68. Contrary to the above requirement [and to the Restatement (Second) of Contracts § 205], Defendants breached their duty of good faith and fair dealing in the performance of the unilateral agreement by using the prescription information of Plaintiff and the Class for undisclosed commercial advantage including receiving money properly belonging to Plaintiff and the Class, realized by Defendants as a result of their subterfuge and evasions.

69. Defendants acted to prevent, frustrate or impede plaintiff and the class from enjoying the rights and benefits to which he/she was entitled by virtue of the unilateral contract between Defendants and Plaintiff and the Class.

70. Plaintiff and the Class did all things required by the unilateral agreement with Defendants and entrusted their prescription information to Albertson's Pharmacy personnel in the belief that Defendants would provide prescription services and that, *inter alia*, Defendants would not use his/her prescription information, in any manner in violation of the law and not "use" Plaintiff's and the Class members' prescription information for commercial gain other than as authorized by Plaintiff and the Class except to satisfy the prescribers direction relative to the prescription and as required by law.

71. Defendants breached the covenant of good faith and fair dealing by, *inter alia*, acting as described above and in an objectively unreasonable fashion.

72. In acting in the manners described herein, Defendants violated the implied covenant of good faith in satisfying Defendants' contractual commitments to Plaintiff and the Class and violated the terms and conditions of Defendants through their activities with Plaintiff and the Class. Plaintiff has incurred damages as a result of Defendants' breaches of the implied covenant of good faith and fair dealing attaching to their contractual obligations.

FOURTH CAUSE OF ACTION

Suppression of Fact Per Cal. Civ. Code § 1710(3)
(Against All Defendants)

73. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

74. Defendants intentionally concealed, and/or suppressed, and/or failed to disclose material facts required to be provided London and members of the Class by virtue of the unilateral contract and the special relationship between Defendants' pharmacies and their patients. This duty emanates from the trust and confidence reasonably placed by Plaintiff London and the Class in Defendants and, more specifically, their licensed pharmacists at Albertsons Pharmacies.

75. Defendants have a duty to reveal the entire truth of its activities and practices once communications are provided to Plaintiff London and the Class regarding the uses by Defendants of patient prescription information.

76. In fact, Defendants suppress or conceal the true facts and fail to disclose, *inter alia*:

a) That patient prescription information will be used as detailed herein;

b) That Defendants receive funds and monies for prescription drug information belonging to Albertson's Pharmacy patients;

c) That Defendants will not reveal the existence or share the financial benefit thus received for unauthorized use of patient prescription information.

77. The Defendants acted untruthfully and suppressed facts with the intent to defraud Plaintiff and the Class causing damage to Plaintiff London and the Class justifying the payment of punitive damages.

78. Plaintiff and Class members were unaware of the fact that Defendants intended to sell their prescription information without their required authorization (per CMIA and unilateral contract) and would not have utilized Defendants' Albertsons Pharmacies and entrusted Defendants with their personal prescription information had they known of Defendants' secret intent to share, sell, disclose and/or use for marketing such prescription information.

FIFTH CAUSE OF ACTION

Violation of Privacy Information under the California Constitution
(Against All Defendants)

79. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

80. At all relevant times, Plaintiff London and the Class members had a legally protected information/privacy interest as recognized by the California Supreme Court in Hill v. National Collegiate Athletic Ass'n (1994) 7 Cal.4th 1 as the core value furthered by the Privacy Initiative. The privacy provision added to our state's Constitution in 1972 elevated the right o be free from invasions of privacy to constitutional status while expanding the activities prohibited as including the use of private information properly obtained for one purpose but subsequently used for another purpose or disclosed to a third party.

81. Plaintiff London and the Class acted reasonably in expecting that their prescription information collected for the purpose of filling his/her prescription would not then be data-based and used for another purpose absent suitable disclosure or consent because privacy to control the circulation of such personal information is fundamental.

82. The conduct of Defendants was highly offensive and unreasonable and deprived Plaintiff London and the Class of the value of his/her property interest. Plaintiff London and the Class acted at all times consistent with their expectation that their privacy interest would be protected by the licensed pharmacist and pharmacy that enjoyed their trust.

83. Defendants intentionally participated in the stockpiling of proprietary prescription information for one purpose while using said proprietary prescription information for another purpose.

84. Defendants are accordingly liable for violations of informational privacy under the California constitution and, given Defendants' perfidiousness, properly subject to punitive damages.

SIXTH CAUSE OF ACTION

Unjust Enrichment
(Against All Defendants)

85. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

86. By the transfer, disclosure, and/or sale of Plaintiff and the Class' prescription information to data mining firms such as IMS and Verispan, Defendants, and each of them, have received and do receive, directly or indirectly, receive payment in the form of a transfer of monies, assets, pharmaceutical products, or services equal to the monetary value of part or all of Plaintiff and the Class' prescription information, that includes the transfer of money, rebates, incentives, bonuses, stock, reimbursement costs, performance measurements, discounts, and special production incentives, pharmaceutical products, or other remuneration.

87. Defendants' use and sell Plaintiff and the Class' pharmacy records and prescription information without express authorization in direct violation of Cal. Civil Code § 56.10(a), (d) and (e) and in breach of Defendants' fiduciary and other duties owing to Plaintiff and members of the Class, including Defendants' express written promises as detailed herein, for which Defendants have been unjustly enriched.

88. Accordingly, and by virtue of the above allegations and the claims asserted herein, Plaintiff, on behalf of himself and in his representative capacity, seeks an order of this Court preliminarily and permanently enjoining Defendants from further using and selling their patients' confidential medical information as alleged herein and, additionally, seeks an order requiring that Defendants:

a. Immediately cease those acts and practices determined to be improper;

b. Make full restitution of all monies wrongfully obtained; and

c. Disgorge all ill-gotten revenues and/or profits.

SEVENTH CAUSE OF ACTION

Trespass to Personalty
(Against All Defendants)

89. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein.

90. Defendants' activities as described by this complaint as they pertain to the unauthorized sale of the prescription information belonging to Plaintiff and the Class members intentionally interferes with the possession of the Class members' personal property rights.

91. Defendants' activities were not authorized, allowed or permitted under the circumstances and proximately damaged Plaintiff and the Class members in that their property was encroached upon without payment therefore and the value/benefit realized by Defendants for their unauthorized and impermissible use of such personalty was properly a benefit and/or opportunity properly realized by Plaintiff and each member of the Class if not for Defendants' activities. Defendants' use of Plaintiff and the Class members' proprietary prescription cost Plaintiff and the Class money while diminished the value of their personal property interests through practices that at no time were authorized, permitted or even disclosed to Plaintiff and the Class.

92. Defendants' unauthorized use of patient prescription information precluded Plaintiff and the Class from exercising their virtually exclusive right granted by the CMIA and unilateral contract with Defendants to determine when, where, why, how and by whom their information may be used.

93. Plaintiff and the Class seek, *inter alia*, to enjoin Defendants' practices, in this regard.

EIGHTH CAUSE OF ACTION

Violation of California's Unfair Competition Laws
(Against All Defendants)

94. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 90 and paragraphs 98 through 102, inclusive, as though set forth at length herein.

95. By engaging in the acts and practices referred to hereinabove, Defendants have committed one or more unlawful, unfair and/or fraudulent business practices within the meaning of Cal. Bus. & Prof. Code §§17200, *et seq*.

96. Defendants' acts and practices alleged in the Complaint constitute a course of unfair, fraudulent and/or illegal business practices within the meaning of Cal. Bus. & Prof. Code §§17200 including, but not limited to, the following:

A. Violation of the California Constitution, Article I, Section 1, (protecting California residents' inalienable privacy rights);

B. Violation of the Confidentiality of Medical Information Act ("CMIA"), Cal. Civil Code §§ 56, *et seq.*, which, *inter alia*, at § 56.10, *et al.*, states:

> 1. **Prohibition on Unauthorized Disclosure of Medical Information**
>
> (a) No provider of health care, health care service plan, or contractor shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization. . . .
>
> ***
>
> (d) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no provider of health care, health care service plan contractor, or corporation and its subsidiaries and affiliates shall intentionally share, sell, or otherwise use any medical information for any purpose not necessary to provide health care services to the patient.
>
> (e) Except to the extent expressly authorized by the patient or enrollee or subscriber or as provided by subdivisions (b) and (c), no contractor or corporation and its subsidiaries and affiliates shall further disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan or insurer or self-insured employer received under this section to any person or entity that is not engaged in providing direct health care services to the patient or his or her provider of health care or health care service plan or insurer or self-insured employer.

Cal. Civil Code § 56.10 (emphasis added).

C. Violation of the Confidentiality of Medical Information Act, Cal. Civil Code §§56, *et seq.*, which, at §56.101 states:

Destruction of Medical Records

> Every provider of health care, health care service plan, pharmaceutical company, or contractor who creates, maintains, preserves, stores, abandons, destroys, or disposes of medical records shall do so in a manner that preserves the confidentiality of the information contained therein. . . .

D. Violation of § 4156 of Cal. Bus. & Prof. Code making it unlawful for a pharmacy corporation to engage in unprofessional conduct including failure to follow Cal. Bus. & Prof. Code §651;

E. Violating Code of Pharmacy Regulations § 1704 (Title 16, Division 17), to which states:

§ 1704: Unauthorized Disclosure of Prescriptions

> No pharmacist shall exhibit, discuss, or reveal the contents of any prescription, the therapeutic effect thereof, the nature, extent, or degree of illness suffered by any patient or any medical information furnished by the prescriber with any person other than the patient or his or her authorized representative, the prescriber or other licensed practitioner than caring for the patient, another licensed pharmacist serving the patient, or a person duly authorized by law to receive such information. (Emphasis added).

97. Defendants' acts and practices as alleged herein are unfair because the utility of the conduct is outweighed by the gravity of the harm it causes and because if offends established public policy or is immoral, unethical, oppressive, unscrupulous, and substantially injurious to consumers. Defendants' wrongful conduct includes violation of numerous consumer laws and public protection as alleged herein or violates the spirit of these laws or otherwise significantly threatens or harms consumers. Defendants' wrongful conduct causes or is likely deceive and to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits to consumers or to competition.

98. Plaintiff and each member of the Class has been deprived of money and had the value of highly marketable information that had been paid for by Plaintiff and the Class members diminished (if not eliminated) by the improper activities of the Defendants.

99. Pursuant to Cal. Bus. & Prof. Code §17203, Plaintiff London and the Class seek, *inter alia*, a temporary, preliminary and/or permanent order from this Court prohibiting Defendants from

continuing to engage in the unlawful and/or unfair and/or fraudulent business acts or practices set forth in this Complaint.

100. Pursuant to Cal. Bus. & Prof. Code §§17200 *et seq.*, Plaintiff London, individually and on behalf the general public and the Class also seeks restitution, disgorgement, injunctive relief and all other relief from Defendants allowable under California law.

NINTH CAUSE OF ACTION

Violation of California's Consumers Legal Remedies Act (Against New Albertson's)

101. Plaintiff London and the Class incorporate by reference and reallege paragraphs 1 through 47, inclusive, as though set forth at length herein as against Defendant New Albertson's only.

102. This cause of action is brought against New Albertson's pursuant to the Consumers Legal Remedies Act, Cal. Civil Code §§ 1750, *et seq.* (the "CLRA").

103. As more fully alleged above, the conduct of New Albertson's was intended to and did, in fact, deceive and mislead Plaintiff and other Class member consumers regarding the patient prescription medical information true data collection, utilization, sharing and sales practices of its Albertson's Pharmacies because New Albertson's omitted to disclose the fact that the patient's confidential and proprietary medical information would be used for purposes other than those reasonably necessary and/or related to the processing of the patient's prescription(s). New Albertson's also failed to disclose to patients that it intended to and did, in fact, share with and/or sell the patient's confidential and proprietary information to third parties for Defendant's pecuniary gain. As a result of these non-disclosures, Defendant New Albertson's has violated, and continues to violate, the CLRA in, at least, the following respects:

(a) In violation of § 1770(a)(4) of the CLRA, Defendant's acts and practices constitute the use of deceptive and misleading representations in connection with the providing of pharmacy services to consumers;

(b) In violation of § 1770(a)(5) of the CLRA, Defendant's acts and practices constitute representations that its advertised pharmacy services and, more specifically, those relating to the permitted usages of a patient's confidential and proprietary medical information, have characteristics, uses and benefits which they do not;

(c) In violation of § 1770(a)(9) of the CLRA, Defendant's acts and practices constitute the advertisement of pharmacy services without the intent to provide such services as represented; and

(d) In violation of § 1770(a)(14) of the CLRA, New Albertson's acts and practices constitute representations that the pharmacy services in question confer or involve rights, remedies, or obligations which they do not have, or which are prohibited by law.

104. Pursuant to § 1782(a) of the CLRA and more than 30 days prior to the filing of this amended complaint, Plaintiff separately notified Defendant New Albertson's of the particular violations of § 1770 of the CLRA and demand that New Albertson's provide and adequate remedy, correction or other appropriate relief for the actions described above and give notice to all similarly affected California consumers of its intention to do so.

105. Defendant New Albertson's has failed to respond to Plaintiff's demand within 30 days of this notice and, therefore, pursuant to § 1782(d) of the CLRA, Plaintiff hereby seeks both injunctive relief and actual damages, plus punitive damages, interest and attorneys' fees against said Defendant. Additionally, Plaintiff also seeks to recover up to $5,000 per eligible Class member as provided for under § 1780(b) of the CLRA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff London prays for judgment against Defendants New Albertson's, Cerberus and Save Mart as follows:

1. For all declaratory and equitable relief as reasonably allowed under the law including enjoining Defendants from the further sale of proprietary prescription data and information;

2. For an order certifying a Class as appropriate relative to the above causes of action;

3. For an order requiring that Defendants disgorge the monetary benefit received as a result of any act or practice declared by this Court to be an unlawful, misleading, deceptive, improper or an unfair business act or practice;

4. Compensatory and statutory damages as permitted under the CMIA;

5. Treble damages as applicable pursuant to Cal. Civil Code § 3345;

6. Compensatory, exemplary and statutory damages against Defendant New Albertson's as permitted under the CLRA pursuant to Cal. Civil Code §§ 1780(b) and 1782(d);

7. Pre- and post-judgment interest;

8. Attorneys fees pursuant to, *inter alia*, the private Attorney General doctrine and/or Cal. Code Civ. Proc. § 1021.5 as may be appropriate, and for all costs of suit incurred herein; and

9. For such other and further relief as this Court may deem just and proper.

JURY REQUEST

Plaintiff hereby requests a trial by jury.

Dated: July 28, 2008

FINKELSTEIN & KRINSK LLP

By: /s/ Jeffrey R. Krinsk
Jeffrey R. Krinsk

Mark L. Knutson
William R. Restis
Jennifer L. MacPherson
501 West Broadway, Suite 1250
San Diego, California 92101-3579

Attorneys for Class Plaintiff
Raymond W. London

CERTIFICATE OF SERVICE

I, Andrea Vasquez, certify that on July 28, 2008, I electronically filed the foregoing FIRST AMENDED CLASS ACTION COMPLAINT with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following individuals:

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